COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	Docket No. 04-33

COMMENTS OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.[1]
REGARDING EFFECT OF *INTERIM RULES ORDER*

Introduction

On August 20, 2004, the Federal Communications Commission ("FCC") released its *Interim Rules Order*.[2] In a memorandum issued by the Hearing Officer in this docket on August 23, 2004, the Department requested comments from the parties regarding the effect of the *Interim Rules Order* on the present arbitration proceeding as well as on Verizon's Notice of Withdrawal of Petition for Arbitration as to Certain Parties ("*Withdrawal Notice*") that Verizon filed on August 20, 2004. Pursuant to the Hearing Officer's August 23 memorandum, AT&T Communications of New England, Inc. ("AT&T") files the following comments.

Background

This proceeding was originally initiated pursuant to a petition for arbitration filed by Verizon on February 20, 2004. In its petition, Verizon alleged that the FCC's *Triennial Review*

[1] AT&T Communications of New England, Inc. files these comments on behalf of itself and all other AT&T entities in Massachusetts, including Teleport Communications – Boston ("TCG") and ACC National Telecom Corp. ("ACC").

[2] *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04 313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (August 20, 2004) ("*Interim Rules Order*").

*Orde*r[3] triggered the "change-of-law" provisions in its interconnection agreements with CLECs, requiring renegotiation of certain provisions and, failing agreement, arbitration of such provisions before the Department. With its petition, Verizon submitted an amendment to its interconnection agreements that it claimed it had sought to negotiate with the CLECs pursuant to the change of law provisions triggered by the *TRO*. Subsequently, on March 2, 2004, in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the D.C. Circuit Court of Appeals vacated and remanded portions of the *TRO*.

Pursuant to a schedule that had not yet been modified in light of *USTA II*, AT&T responded to Verizon's petition on March 16, 2004, stating that it had sought to negotiate the provisions proposed by Verizon and, significantly, sought to negotiate new contract provisions arising from new obligations imposed on Verizon by the *TRO*. Having made no progress in its negotiation with Verizon, AT&T asked the Department to arbitrate the issues that it identified in its response. AT&T attached a copy of its counter-proposal and a detailed matrix explaining each contested issue.

As a result of *USTA II*, Verizon filed on May 5, 2004, a motion for an abeyance of the proceeding. After a series of comments and reply comments regarding Verizon's abeyance motion in May through June 1, no further activity occurred in this docket until Verizon filed its *Withdrawal Notice* on August 20.

Comments

Clearly the legal foundation of this case has changed significantly since it was first docketed. The basis for Verizon's arbitration petition and the basis for AT&T's response was

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*")

the *Triennial Review Order*. That order has now been vacated in part and remanded in part by the *USTA II* Court. Moreover, the FCC has now issued its *Interim Rules Order*. AT&T does not know what amendments Verizon will now seek to make to its interconnection agreements as a result of the changed legal predicate since the original Verizon petition. We do know, however, that AT&T intends to seek changes to its interconnection agreements with Verizon on the basis of the *Interim Rules Order*. Unlike the *TRO*, the *Interim Rules Order* authorizes the negotiation and even arbitration of contract amendments on the assumption that there may be a future elimination of some network element unbundling requirements (provided, however, that no elimination of unbundling requirements under the amendment shall become effective until after the effective date of new law permitting such elimination). While AT&T believes that for the forseeable future Verizon will remain subject to critical unbundling requirements based on Verizon's Bell Atlantic/GTE Merger obligations and state law, AT&T will seek contract amendments that address the transition process for the future elimination of unbundling requirements and contract amendments that will enable AT&T to do business upon the elimination of such unbundling requirements.

We are, therefore, in a very real sense starting over. By contract, AT&T and Verizon must seek to negotiate any proposed amendments to their interconnection agreements arising from the *Interim Rules Order*. Moreover, AT&T and Verizon have remaining unresolved *TRO* issues that are still relevant post *USTA II*, because the relevant *TRO* provisions have not been vacated. AT&T, for example, still seeks to obtain its rights to EELs under the applicable provisions of the *TRO*, provisions that were not vacated by the *TRO* and which Verizon – in its refusal to provision EELs – has violated continuously since the *TRO* rules became effective on

October 2, 2003.[4] Even with respect to issues that remain open from the *TRO*, the parties may wish to modify their positions in light of *USTA II* and the *Interim Rules Order*. For example, while AT&T still seeks to enforce a right to EELs that it has had since October 2, 2003, AT&T may want to modify the exact language it has previously proposed in light of the *USTA II* rejection and remand of the FCC's distinction between qualifying and non-qualifying services[5] and in light of the *Interim Rules Order*'s authorization to anticipate rights and obligations that the FCC's order on remand from *USTA II* may subsequently affect.

Because we are effectively starting over, any party who believes that its contract permits it to renegotiate provisions upon a change in law should be given an opportunity to present its proposed changes to the other party to the interconnection agreement. The parties must be given sufficient time to negotiate those provisions. AT&T proposes a minimum sixty day period from the date the Interim Rules Order is published in the Federal Register within which the parties may propose amendments to their interconnection agreements and, if such amendments are proposed, seek to negotiate them. Based on AT&T's experience attempting to negotiate Verizon's initial *TRO* contract amendment and AT&T's counter-proposal, no period less than sixty days will be sufficient for the parties to comply with their statutory duty to negotiate in

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[4] Indeed, Verizon has refused to modify its Tariff 17 to comply with the *TRO* requirements, a knowing, deliberate and flagrant violation of both the Department's September 7, 2000 Order in D.T.E 98-57 – Phase I and Tariff 17, Part B., Section 13.1.1.D. Specifically, the Department ordered Verizon to include language in its tariff indicating that the tariff will reflect changes in the eligibility criteria for ordering EELs as they are ordered by the FCC. *See*, D.T.E 98-57 – Phase I (Sept. 7, 2000), at 33, 37 ("the Department instructs Verizon to include a provision in its EEL offering stating that it will amend its tariff to include any future FCC-approved definitions of significant local usage."). In accordance with the Department's directive, Verizon included a statement in the EEL section of Tariff 17 (Part B, Section 13) that "[t]he Telephone company will amend this tariff to include any future FCC-approved significant local usage options, as required." *See*, Tariff 17, Part B., Section 13.1.1.D. Despite the requirements of the *TRO*, the Department's September 7, 2000 decision and its own tariff, Verizon to this day refuses to comply.

[5] *USTA II*, at 591-592.

good faith. Indeed, based on the experience of some parties, even sixty days is likely to be too short.[6]

At the end of the sixty day negotiation period, parties should be allowed to file a petition to arbitrate any contract amendment issues that remain unresolved. Such an approach will obviate the need to address Verizon's current *Withdrawal Notice*. This is as it should be since many CLECs may have appropriately relied on Verizon's petition to arbitrate as the vehicle for presenting the contract changes they seek as a result of a change in law. Permitting Verizon to withdraw its petition to arbitrate now, after those CLECs refrained from filing their own petitions in reliance on Verizon's petition, would be unfairly prejudicial.[7] In any event, the Department

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[6] *See*, Sprint's Response And Motion To Dismiss Verizon's Arbitration Petition, filed on March 15, 2004, in this docket. *See also, In Re: Petition Of Verizon-Rhode Island For Arbitration Of An Amendment To Interconnection Agreements With Competitive Local Exchange Carriers And Commercial Mobile Radio Service Providers In Rhode Island To Implement The Triennial Review Order*, Docket No. 3588, Procedural Arbitration Decision (April 9, 2004). In that decision, on a Sprint motion to dismiss that is nearly identical to the one filed in this case, the Arbitrator found that Verizon had violated its obligation to negotiate in good faith. Referring to Verizon's tactics, the Arbitrator stated:

> This is not a good faith effort to negotiate. When a party fails to make a sufficient effort to negotiate and resolve issues prior to arbitration, it is a disservice to the CLEC and the Arbitrator because it requires all to address issues that could possibly have been resolved before going to arbitration. . . . . VZ should not be rewarded for the negotiating tactics it apparently used with Sprint. A duty to make a good faith effort to negotiate precedes a right to arbitration. VZ-RI can not "skip a step" because it would be more efficient for it to arbitrate with all CLECs all at once rather than negotiate with individual CLECs. Accordingly, Sprint's motion to dismiss as to VZ-RI's petition to arbitrate with Sprint is granted. VZ-RI is directed to reinitiate negotiations with Sprint.

Id., at 5-6 (emphasis in original).

[7] Indeed, this is precisely the reason that the Code of Massachusetts Regulations prevents Verizon from unilaterally withdrawing its petition after the other CLECs have responded. *See*, 220 CMR 1.04(4)(b). In any event, if the Department were to allow Verizon to withdraw its arbitration petition with respect to specific CLECs, such withdrawal would not eliminate from this proceeding the issues that the affected CLECs had raised in their responses. As succintly stated by the Hearing Examiner in Vermont,

> Section 252(b) contemplates that the party that does not request arbitration may raise additional issues in its response. Moreover, subsection (b)(4)(C) of that section specifically states that the Board "shall resolve each issue set forth in the petition *and the response* . . ." (Emphasis added.) This makes clear that, as to those parties that raised additional issues for arbitration in their responses, the Board should continue to arbitrate those issues. Verizon's withdrawal may remove the issues for which Verizon sought arbitration; it does not eliminate the issues raised in response.

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need not decide that issue now because the *Interim Rules Order* has triggered a new schedule for seeking contract amendments as a result of a change in law. CLECs may now file their own petitions to arbitrate if they do not resolve their issues with Verizon through negotiation. AT&T intends to do so.

Beyond the establishment of a period sufficient for the parties to satisfy their statutory obligation to negotiate in good faith and a date by which parties failing to reach agreement may file a petition for arbitration, there is little that the Department should do in the next sixty days, other than ensure that obligations and pricing under the existing interconnection agreements remain in force without unilateral discontinuance by one party. After the end of the sixty day negotiation period, the Department should be prepared to address the unresolved issues expeditiously. As we get closer to the end of the sixty day negotiation period, approximately mid-November, it would be appropriate for the Department to seek a status report from the parties as to which parties are likely to file a petition for arbitration and the number and scope of issues likely to be addressed. The Department will then be in a position to establish a more defined schedule for resolving the remaining open issues.

Conclusion

AT&T appreciates the opportunity to provide the Department with its views on the best way to proceed. As AT&T stated above, the best way to proceed, and the only way that complies with the statutory obligation of good faith negotiation, is for each party to seek to negotiate any changes to its interconnection agreement to which it believes it is entitled as a result of the *TRO, USTA II*, and the *Interim Rules Order*. Failing succesful negotiation within a

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Vermont, pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order, Vermont Docket 6932, Order Re: Verizon Motion Of Withdrawal (August 25, 2004), at 4-5 (footnote omitted).

period of sixty days, any party may then seek the Department's assistance by filing a petition for arbitration.

Respectfully Submitted,

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